IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,

Plaintiff in Error,

vs.

ELI MELOVICH,

Defendant in Error.

No. 2160

Brief of Defendant in Error

HERBERT W. MEYERS,
CHARLES A. ENSLOW,

Attorneys for Defendant in Error.

Pioneer Building,
Seattle, Washington.

The Ivy Press, Third and Cherry, Seattle

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Plaintiff in Error,* vs. ELI MELOVICH, *Defendant in Error.*	No.....

Brief of Defendant in Error

HERBERT W. MEYERS,
CHARLES A. ENSLOW,

Attorneys for Defendant in Error.

Pioneer Building,
Seattle, Washington.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Plaintiff in Error,
vs.
ELI MELOVICH,
Defendant in Error.

No.....

Brief of Defendant in Error

ARGUMENT

Plaintiff in error has, after two trials lasting two days each, and after the first jury's verdict for $12,262, the full amount of plaintiff's claim, after the second verdict of $4,262, and after two long years of trying litigation, with as many attempts made to defeat the plaintiff as were ever made in any law suit, has for the first time practically admitted the weakness of its cause by the character of brief submitted and citations made.

As suggested by the appellants, the parties hereto will be referred to as plaintiff and defendant as in the lower court. Before entering upon a discussion of the points involved, it is desired to point out a few of the discrepancies in the brief of the defendant. On page 4 thereof, reference is made to the electric motor that furnished the power for the operation of the cog wheels that crushed the arm of the plaintiff, and the attention of the court is now called to the fact that it was no part of that motor which inflicted the injury. We should not confound the cogs in which plaintiff lost his arm with the converted street car mechanism which was operated by the plaintiff and referred to as a "motor," but which had no dangerous parts exposed and which was operated by a lever or handle as is a street car motor, and which, instead of being "similar," as asserted (brief p. 4), was "altogether different" from the other motor (Trans. p. 196), and in working on the motor below he could not see cogs above, as they were high in the air and some distance away.

The platform "immediately beneath the cog wheels" (Trans. p. 4) is shown to be about four feet below the bearings that the plaintiff went up to oil (Brief, p. 5), indicating that the place in

which the oil was to be put was about on a level with the breast of a man, and the oil can used was about one foot long in all and the spout on the end was straight (Tr. p. 189), and not "a can with a hooked stem from twelve to eighteen inches in length," as asserted (Brief p. 5). By reference to page 28 of the brief, it will be found stated that plaintiff testified that he had acted "as brakeman upon railroad train." Nowhere in the testimony will it be found that the plaintiff or any one else testified that plaintiff had ever acted as brakeman upon a railroad train, and the fact is that in the trial before the first jury he testified that he had done laboring work in a railroad gang and had been working for three months for defendant but had only on two occasions for a moment been up to oil the cogs in question and that that was not his work.

As stated (Brief p. 6), "through some inadvertence or for some reason," one hundred five pages of the transcript consists of matters involved in the first trial; we believe, however, that it will be helpful and material to an understanding of this case as the case was tried the first time. The defendant calls special attention to the fact that the "inadvertence" which resulted in bringing the first trial prominently before this court is not properly chargeable

to him, but nevertheless counsel ordered said transcript of their own free will and accord without even a suggestion from counsel for defendant in error. The inclusion of the record of the first trial in the printed record is commendable, and the defendant in error waives any right he may have to object to it. It is therefore, respectfully commended to the consideration of this court, as being historical if not most material, especially the portion which refers to the granting of the new trial and the setting aside of the first jury's verdict for $12,262 owing to the alleged improper use of the word *"ANY."*

Fourth and Fifth Assignments of Error.

The defendant discusses the fourth and fifth assignments of error first, and the plaintiff will, in his brief, take up the various assignments of error in the same order.

The first contention of the defendant is that the plaintiff assumed the risk of injury, and in support of this contention it calls attention to the age of the plaintiff, and that he had oiled the machinery in question four or five times prior to the day when he was injured. The testimony of defendant's witness David Roberts, is garbled and improperly stated (Brief p. 21; Transcript p. 211).

Stenographer's transcript, page 141, is as follows:

"Q. Mr. Roberts, on the occasion of the former trial were you asked this question, or rather did you give this answer (reading): 'A. We were talking with Melovich, and Melovich had been up there quite a while working at different occupations, but we asked him how long he had been on this particular work that he was hurt on, and he said that he had been there about twenty days, and they asked him how long or how often during each day he had oiled the gearing, and he said—*somebody said* "Five" and he said "Yes," and *somebody* said "Ten" and he said "Yes." He was talking very brokenly, and my best impression of it is that, while no definite time was arrived at, that it was several times that he went up and oiled that gear each day'?

A. Yes.

Q. Did you make that statement?

A. Yes."

It is evident that the statement of the testimony of Mr. Roberts as given on page 211 of the Transcript would not give this court an unbiased idea of the true facts as testified by Mr. Roberts.

As supposedly indicating that the plaintiff knew of, understood and appreciated the danger, the defendant says (Brief p. 21) that the plaintiff testified that he had taken care of and oiled the motor that he had been operating for several weeks before the accident, but that that motor was covered, but no mention is made in the brief of the fact that plaintiff

never oiled that motor when it was running, but always at noon when he went to work, and then merely put the oil in the box where it had to be oiled, and the only place where it could be oiled because of the fact that the cog wheels were covered (Trans. p. 195), and the motor was altogether different (Trans. p. 196). It is also stated by the defendant (Brief p. 21) as indicating knowledge of the danger on the part of the plaintiff that the plaintiff described the location of the platform above which the cog wheels rested and other parts of the machine, in such a way as to evince a knowledge of them such as would cause him to know and appreciate the danger. It will be remembered that the plaintiff testified in this case after having been through the first trial of the case (See Trans. pp. 37 to 142), and that he had visited the gravel machine several times with his attorney, in getting the various pictures and had after the accident had the details impressed on him (Stenog. Trans. of Evidence p. 15), and that he was present when the photographs of the machine were taken (Stenog. Trans. of Evidence p. 11). He saw the cog wheels of the machine after it had taken his arm off about the same number of times that he had seen them before the accident, and it would be but reasonable

to concede that he would have a more acute interest in the details of the machine and give it closer scrutiny and understand and appreciate the danger better after it had ground his arm off than he would have had before the injury to him. It is but an exemplification of the old adage of the burned child and the fire.

After quoting from the testimony of the plaintiff concerning a certain statement made by him on the first trial of the case, wherein, "after the lawyer had asked him a hundred different times," he said, "any crazy man would know better" than to put his hands in the wheels when putting oil on the cog wheels, the defendant refers to plaintiff as "shrewd and keen enough to realize the danger that would result to him if he would frankly admit upon the second trial the facts that he testified to upon the first trial, viz.: That he knew the revolving cog wheels were dangerous and that if he came in contact with the cog wheels he would be injured." On the trial, the plaintiff testified (Trans. p. 171):

"Q. When the wheel was going around, could you see the cogs?

A. It goes fast like the wind is blowing and you could not see it."

From this it is evident that he did not appreci-

ate the danger from the cogs, since he could not see them. Even if he could have seen them still he would not be charged with the knowledge the defendant would have this court believe he possessed, upon such evidence.

The court will readily distinguish the difference between putting one's hand in among cog wheels, and reaching over such cogs to put oil on a bearing of the machine of which the cogs were a part. Plaintiff was oiling the bearings and not thrusting his hands into the cogs, as defendant would have us believe. The place was not, as plaintiff in error would have us believe, *light,* but being boarded up, was very dark (Brief p. 20; S. of F. p. 40).

The knowledge of a possible injury one may suffer if he deliberately places his hand in exposed cogs or wheels, as distinguished from his knowledge of the danger to him from a situation in which he is placed by reason of the negligence of another in not furnishing safe surroundings and suitable instrumentalities in and with which to work, is distinguished in a case in the Circuit Court of Appeals, Second Circuit, decided January 9, 1911, in which case the parties and the facts were practically no different from those in the present case.

In that case the defendant alleged that the plaintiff, who was a Russian Pole, speaking and understanding the English language imperfectly, a common laborer, while working for the defendant had his right arm caught in a machine and so crushed and mangled that amputation became necessary, was negligent in that he endeavored to put certain material into a machine while it was in motion; the injury occurring four and one-half days after he had first commenced to work with the machine. The defendant's theory there was, as is contended in this present case, that the plaintiff instinctively knew of the danger. In the opinion in the case, *American Manufacturing Company vs. Zulkowski,* C. C. A. 146, the court, through Coxe, Circuit Judge, said:

"In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. *Even the most ignorant laborer would have known that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. * * * The jury were justified in considering the improbability that he would do an act which would impeach his sanity.*"

Thus, it is held that while a person's instinct may create within him a certain fear due to his surroundings yet not induce such knowledge as would

bring him to *understand and appreciate* the danger, so as to charge him with assuming a risk in having encountered it.

These cases just cited go to establish the rule that where a servant either does not know, or, knowing, *does not appreciate such risks;* and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries; and the natural corollary that if the employer knows, or ought to know, that the dangers of the employment are unknown to or not appreciated by the servant, the servant should be instructed so that he may reasonably understand the perils. That such is the rule of law is well supported by decisions of the highest courts.

Choctaw, etc., R. Co. vs. McDade, 191 U. S. 64 (48 L. Ed. 96).

Railroad Co. vs. O'Brien, 161 U. S. 451 (40 L. Ed. 766).

Voelker vs. Railroad Co., 116 Fed. 867.

Railroad Co. vs. Holloway, 52 C. C. A. 260 (114 Fed. 458).

Pierce vs. Calvin, 27 C. C. A. 227 (82 Fed. 550).

Davison vs. Railroad Co., 44 Fed. 475.

Bean vs. Navigation Co., 24 Fed. 124.

Thompson vs. Railroad Co., 18 Fed. 239.

Railroad Co. vs. Linstedt, 106 C. C. A. 238.

Mather vs. Rillston, 156 U. S. 391 (39 L. Ed. 464).

Lathi vs. Rothschild, 60 Wn. 438.

The mere fact that the employe *knows* there is danger will not defeat his right to recover if in obeying the order of his employer he acted with ordinary care under the circumstances.

Allen vs. Gilman, McNeil & Co., 127 Fed. 609.

R. R. vs. Linstedt, 106 C. C. A. 238.

In the case of the *Atlantic Coast Line Railroad Co. vs. Linstedt,* 106 C. C. A. 238, decided late in the year 1910, it is said:

"The defendant cannot, as a matter of law, defeat the right of the plaintiff to recover merely because the danger of riding on a brake beam was apparent, if the safety and suitableness of the same as an appliance was in issue, and the inexperience, lack of knowledge and failure of warning to the plaintiff was also present.

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*

"Authorities to support these views might be given almost without number. *Butler vs. Frazee,* 211 U. S. 459, 466, 469, 29 Sup. Ct. 136, 53 L. Ed. 281, an opinion by Mr. Justice Moody, will be found to

contain a particularly interesting discussion of the subject, with citation of authorities."

In the case of *Butler vs. Frazee,* 211 U. S. 459, 53 L. Ed. 281, is said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to *understand, appreciate and assume* the risk of it."

Railroad Co. vs. Swearington, 196 U. S. 51 (49 L. Ed. 382).

Fitzgerald vs. Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537.

R. R. vs. Jarvi, 53 Fed. 651 (3 C. C. A. 433).

In *Railroad vs. Swearingen,* 196 U. S. 51 (49 L. Ed. 382), the following language was employed:

"As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 *could not be imputed to the plaintiff simply because he was aware of the existence and general location* of the scale box, *it was for the jury* to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual *knowledge* of the danger."

Indeed, it has been said that a servant who does not *appreciate* the dangers to which he is subjected is not to be held to have assumed the risks of the employment only, but that he *cannot consent* to assume them. In *Felton vs. Girardy,* 104 Fed. 127,

the opinion by Lurton, Circuit Judge, says:

"If the employment be of a dangerous character requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, *incapacity or inexperience, does not appreciate them, the servant cannot, even with his own consent, be exposed to* such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and with proper care on his part, do his work safely."

The same court, by the voice of the same judge, said in *Railroad Company vs. Miller,* 104 Fed. 124:

"It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant; unless the dangers are so obvious that even an *inexperienced man could not fail to escape them by* the exercise of ordinary care.

"The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from want of the degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity.

"If the master has notice of the dangers liable to be encountered, *and notice that the servant is inexperienced,* or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty."

In the case of *Clow & Sons vs. Holtz,* 34 C. C. A. 550, the court left the question to the jury to say whether the car by which the plaintiff was injured, as constructed, with certain wedges which had been added and of which he knew, was a machine which a reasonably prudent employer would furnish to his servants to be used in his business, and charged the jury that if the dangerous character of the machine *was so obvious that an ordinarily intelligent laborer of the class of laborers to which the plaintiff belonged must or should have observed its danger,* and the plaintiff nevertheless continued in the employ of the master without complaint, he assumed the risk incident to such employment, and was guilty of contributory negligence, should injury occur.

The Circuit Court of Appeals, in an opinion by Taft, Circuit Judge, said:

"The only point upon which we feel the slightest doubt in this case arises upon the motion which was made by the defendant, at the close of the plaintiff's evidence, to take the case away from the jury and direct a verdict for the defendant, on the ground that the plaintiff *must have known* the dangers incident to the use of the machine from the use of which the injury happened, *and must therefore have assumed the risk.*

Now that the accident has happened, now that the measurements are given, now that the weight of the cores are accurately known * * * it may be

difficult to understand how anyone with the slightest knowledge of mechanics could fail to appreciate the dangers arising from the use of this car with the cores adjusted as they were. But it must be borne in mind that the plaintiff was a *common laborer;* that the safety of the machine had been brought to the attention of the superintendent and managers of the foundry; that the car had been operated for six months without injury, and that the plaintiff had a right to assume that his master would exercise due care in his behalf in keeping the machinery and appliance safe.

In the light of these considerations, *we cannot say that the question of the plaintiff's negligence, or the question of the amount of risk which he assumed, was not a* question for the jury.

It was left to them with the proper and discriminating statements of the law, and application of the law to the facts.

The jury found that the circumstances were such that he was not charged with the knowledge of the danger incident to the use of that machine.

We do not think the course of the court, in leaving this issue open to be settled by the jury, was erroneous."

In *Deninger vs. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911, Gray, Circuit Judge, said:

"The defendant, however, relies strongly upon the proposition that the risks of the situation were all *known to* and appreciated by the deceased, and therefore assumed by him as risks of his employment. Certainly this is true of the ordinary risks inherent in the employment, but it is not true of the risks or dangers arising from the default of the defendant.

Whatever the risks assumed by a servant in entering upon his employment may be, the one risk he does not assume, is that arising from the negligence of his employer. * * *

The law deals with men in their various relations in life, as endowed with average intelligence and capacity, and recognizes their limitations, and that under certain circumstances, inadvertence and distraction may be excusable, where under other circumstances they would constitute a serious default. *If, then, the absence of the automatic safety device, which in efficient operation would have prevented the accident, was due to a want of reasonable care on the part of the master, the risk arising from its absence was not one of the risks assumed by the deceased in entering upon his employment.* Though this risk, arising from the negligence of the master, was not thus assumed, yet it is true that, if the deceased was *aware of and appreciated the danger* therefrom he might, by his own negligence in exposing himself thereto, have contributed to his injury, and thus debarred himself from recovery. But there is no affirmative proof of such negligence on the part of the plaintiff, and no fact referred to from which such negligence can be properly inferred as a matter of law. The facts and testimony bearing upon the question were, however, submitted to the jury with proper instructions by the court below.

In considering, on the evidence, the question as to how far primary duty of the master was performed, in providing the safe place in which to work and the safe applicance with which to work, it must be remembered that there was no compulsion on the defendant to use this dangerous hand lever in the operation of its machine. There was testimony before the jury, to be given such weight as they determined justly attached to it, that these levers were first used in these new and large machines; that

this very head had been frequently operated with a wheel of moderate size, and that it had been so operated ever since the accident. Obviously, the use of the wheel for the purpose that the lever was used for would have avoided all the dangers attending upon the latter. The mere fact that it required more power to move a wheel of moderate diameter would not necessarily excuse the defendant from adopting it, in view of the tragic experience in its own shops with the hand lever. No mere economy, pecuniary or otherwise, can excuse a master from the performance of the primary duty imposed upon him to make a reasonable safe place in which his servant is to work.

This case was submitted to the jury by the learned judge of the court below, and with this evidence all before it, it found a verdict in favor of the plaintiff. A motion for peremptory instructions for the defendant was denied by the court, and after verdict, motion for a new trial and for judgment, *non obstante veredicto*, was made by the defendant, which latter motion was granted by the court, and judgment entered accordingly. *We think this case should not have been disposed of, and there was evidence sufficient to go to the jury and to warrant the verdict rendered.*"

It is contended by the defendant that the rule of the law in the State of Washington differs from the rule as laid down in the cases cited. The opinion in the case of *Lahti vs. Rothchild*, 60 Washington 438, rendered in November, 1910, says:

"Learned counsel for appellant contend that the use of the large link chain for handling this lumber, and the evidence tending to show that it was not suitable for that purpose, was a sufficient showing of

negligence on the part of respondents to call for the submission of that question to the jury. This contention we think is well founded, unless it can be held, as a matter of law, that appellant assumed the risk incident to the use of the chain because of his knowledge of such use and the danger thereof. It seems to us that a jury might well be justified in believing from this evidence that the risk incident to the use of this large link chain was extraordinary. That is, *that it was a risk which could have been obviated* by the exercise of reasonable care on the part of respondents. 1 *Labatt, Master and Servant,,* Sec. 270. Hence, its use might justify a finding of negligence against respondents, though it may be conceded that it would not be such negligence but that liability therefor could be obviated by appellant's assuming the risk. Now, can it be said, as a matter of law, upon this record, that appellant assumed this risk, supposing that the jury might conclude that the risk was extraordinary. This question must be answered in the light of the evidence touching appellant's knowledge of the use of the chain, *and also his knowledge of the danger incident to its use.* Of course, he knew of the use of the chain, but before he can be charged with assumption of the risk, it must appear that he *comprehended the danger* as well as knew of the physical conditions. *Bailey, Master's Liability for Injuries to Servants,* 184; *Wood, Law of Master and Servant* (2nd Ed.), Sec. 376; *Shoemaker vs. Bryant Lum. & Shingle Mfg. Co.,* 27 Wash. 637, 68 Pac. 380.."

In 1 *Labatt on Master and Servant,* Sec. 271, the rule is stated as follows:

"An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and *comprehended* by the servant, or—as the same conception may also be expressed in logically equivalent

terms—where the servant is chargeable neither with an actual nor a constructive knowledge and *comprehension of the risk.*"

Learned counsel for respondents contend, in substance, that the evidence of appellant's experience as a longshoreman is sufficient to impute to him a *comprehension of the dangers* of using this large link chain, and that the trial court was justified in so determining as a matter of law. It is true that appellant appears to be a longshoreman of considerable experience. He tells us in his testimony, however, that he never had experience in the use of a chain of this size in handling pieces of these dimensions, and did not know that such chain could not securely hold a sling load of such pieces. We have seen that he worked there five or six days under these conditions without anything occurring that would suggest such danger to him. *If he comprehended*, or was bound to comprehend, such danger, it was only because of his general knowledge of, and experience in, the business. It seems to us the danger was not so apparent that it can be decided, as a matter of law, that a reasonable person in his position and *with his knowledge and experience* was bound to *know and comprehend* the risk incident to the use of this chain. *We think reasonable minds might differ upon this question, and that it was*

therefore a question for the jury. We conclude that the learned trial court erred in taking the case from the jury at the close of appellant's evidence.

What are the facts in this case at bar with respect to the capacity, knowledge and experience of the plaintiff, as shown by the evidence in the case, and upon which should be based the decision as to whether or not the danger incurred by him in working about the cogs which caused his injury was necessarily obvious to him?

The plaintiff is an *uneducated* man, who does not *speak nor understand* the English language. He testified that he was employed in the capacity of a common laborer, that he had no knowledge of machinery, had never worked about it, never saw a set of cogwheels prior to beginning work for the defendant company, and was not instructed as to the manner of doing the work nor of the danger which he would encounter in doing it. Upon cross-examination he reasserted that he had never worked with machinery other than the pick and shovel, nor about it, nor in mines, and was totally ignorant of it. *His testimony is absolutely undisputed.* It is evident, therefore, that, as a matter of law, he was disqualified to do the work assigned to him in the oiling of the cogs which caused his injury, because of his

want of capacity, lack of knowledge and inexperience, and consequent failure to *appreciate and actually know the danger incident to such work.*

The Circuit Court of Appeals, Ninth Circuit, in an opinion by Gilbert, Circuit Judge, in *Puget Sound El. Ry. v. Van Pelt*, 93 C. C. A. 492, said:

"To make a complete and valid defense on that ground, it should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was; the nature of the danger in which he was placed for work, with that fuse located as it was. The law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. * * * He is chargeable with the assumption of risks that are necessarily incident to the employment, and with the assumption of risks which he knew about, *of which he had knowledge—actual knowledge*—and also the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake."

Could it be possible to conceive of a more thoroughly irresponsible person in the situation in which this plaintiff was placed when he was ordered to oil the cogs, gears, etc., which caused his injury, or one having less experience or capacity and less capable of *understanding and appreciating* the dangers inci-

dent to the work to be done; or one more completely within the exceptions announced in the cases which have been cited above? Can it be said, either as a matter of law or as a matter of fact, that the plaintiff in this case, upon the evidence in the case, *appreciated* the danger he encountered? If he did not, then, as a matter of law, he did not assume the risk.

The court did not err in denying defendant's motion for non-suit, at the close of plaintiff's case, since there was testimony which, if not contradicted, would sustain the main allegations of the complaint, and that it was not overcome by the testimony of witnesses for defendant is established by the verdict of the jury.

In *Kreigh vs. Westinghouse,* 214 U. S. 249 (53, 984), it is said:

"Questions of negligence do not become questions of law to be decided by the court, except where the facts are such that all reasonable men *must* draw the same conclusion from them; or in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Gardner vs. R. R., 150 U. S. 349 (37-1107).

The trial judge, after listening to the testimony on the first trial of the case, and again on the second trial, recognized the fact that all reasonable men could not draw from the evidence the conclusion that the plaintiff was not entitled to recover for the injuries he sustained, and, accordingly, when the motion for a directed verdict was made said:

THE COURT: "I consider that it is expedient for the jury to decide this case. I shall deny the motion." (Trans. p. 224.)

That all reasonable men would not draw the same conclusion from the evidence is further established by the action of the jury, in which twelve men of the average of the community, comprising men of education, men of learning, and men whose learning consists only of what they have themselves seen, heard and experienced — merchants, mechanics, ranchers, bankers, clerks, laborers, sat together, listened attentively to the proof submitted by both sides to the controversy, consulted with one another, and applied their separate learning and experiences of the affairs of life to the facts as proven, and drew a unanimous conclusion in opposition to the contention of the defendant, and substantiated the opinion of the trial judge when he said he deemed it expedient for the jury to decide this case.

In *Atlantic Coast Line R. R. Co. vs. Lindstedt*, 106 C. C. 238, the court says:

"In a case, as here, however, where the plaintiff bases his right of recovery on the unsafe and defective appliances of the defendant, and sets up his own infancy, and the defendant relies as a defense upon the plaintiff's assumption of risk and contributory negligence, and the plaintiff's inexperience, and the defendant's failure to instruct him in his duties, or properly warn him against unusual danger or hazard incident thereto appearing, then, in such case, it at once becomes material to determine whose negligence really brought about the disaster, that of the plaintiff in not properly performing the duties required of him, or the defendant in failing to perform some duty imposed upon it, which can only be ascertained from a full consideration of all of the facts and circumstances surrounding the occurrence; *and the jury is the proper tribunal to settle disputed issues of fact thus arising, if any there be, as in any other case.* * * *

In this case disputed questions of fact having arisen as to the *suitableness and safety of the appliances furnished by the defendant to the plaintiff*, with which to perform the service required of him, and the necessity for the use thereof by plaintiff when injured, as well as over the plaintiff's capacity properly to perform the service in hand, in the light of his youth, knowledge and experience, and whether, because thereof, and from lack of instruction and proper warning, he either did not know of the danger in which he was placed, or, if apprehended, it was *not appreciated* by him, and as to all of which there was a considerable conflict in the testimony, it was *manifestly proper for the trial court to overrule the motion for non-suit, and to instruct a verdict for the defendant*, and to submit the same to the jury under proper instructions as to the

law applicable to the case, which was done, with such degree of fairness to the defendant, that no objection thereto was made by it, though the plaintiff excepted to the rejection of sundry requests for charge to the jury asked by him. Under these circumstances, a verdict having been returned for the plaintiff, which has met with the approval of the trial judge who saw and heard the witnesses testify, and was therefore peculiarly able to judge of the weight that should have been given by the jury to their several statements, this court would not be justified in disturbing the judgment thus entered, particularly on a motion to either withdraw the case from the jury, when the view of the testimony most favorable to the plaintiff must be taken."

Kreigh vs. Westinghouse Co., 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984, *supra.*

The C. C. A. 9th Ct. in *Railroad vs. Lundberg*, 100 C. C. A. 323, holds that:

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. *The question of assumption of risk also involved consideration of the facts and circumstances adduced upon the trial, and was properly submitted to the jury.*"

Second Assignment of Error.

The defendant states (Brief p. 42) that the witness, Mr. Savage, was not shown to have any qualifications or any knowledge or experience in the

business sufficient to enable him to form an opinion as to the custom for companies to guard cogs of this sort. The witness testified:

"Since I have been in the West it has been mostly around mines, until here for the last twenty years I have been with the Great Northern, principally in putting in machinery for them, that is, *around mixers* and gravel machines and compressors and general construction and so forth, until here in the last four or five years I have not been with them."

Q. You know a good deal about concrete mechinery then?

A. I ought to, I have been at it long enough. (Stenographer Trans. of Ev. p. 64.)

It is submitted that this testimony of this witness was such as to establish him as an expert, and this view of it seems to have been taken by the trial judge.

The answer of the witness to the question: "Mr. Savage, is it customary for companies to guard cogs of that sort?" that "It has been in all my cases," is truly responsive, since it comprehends all of the knowledge the witness has on the subject. The assertion is made that as this case was tried as at common law, "it became wholly immaterial as to what the custom was."

As was stated in *Shaw vs. Woodland Shingle Co.*, 61 Wash. 56:

"It is further contended that respondent was permitted to show that other mills and more modern

mills were not equipped with guards. It is not contended that a compliance with the statute, Rem. & Bal. Code, Sec. 6587, can be excused by showing that other mills had not complied with the provisions of the law: but where, as in this case, the question of practicability was a direct issue before the jury, it cannot be held to be error, where the opinions of skilled persons are offered to prove the custom, although it may develop upon their examination that other mills with which they are acquainted and upon which their opinions are based have not found guards to be practicable." * * *

"We think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with other facts and circumstances developed by evidence in the case." * * *

On the question whether the employer has exercised reasonable and ordinary care in providing and maintaining safe appliances, and places for work, the plaintiff may show the general practice of other employers in similar lines of employment in these respects.

Olesen vs. N. O. Lumber Co., 119 Fed. 77.

Spiro vs. Fellon, 73 Fed. 91.

Crocker vs. Co., 34 Wash. 191.

In the case *Ohio Copper Mining Co. vs. Hutchings*, 172 Fed. 201, the court says:

"A witness of eighteen years' experience in mining, twelve or fourteen of which was as a timberman, testified to what was customarily or usually done in mines to support treacherous and unstable ground and to protect the miners therefrom, and then he was allowed to compare the ordinary practice with what he observed at the point of the accident. This was admissible. What was ordinarily done in other mines with reference to like conditions, while not the measure of reasonable care, is competent evidence thereof. Another witness of twelve years' experience as a timberman in mines, who was at the place of accident shortly after it happened, and who knew the character of the formation of the hanging wall, was allowed to testify that it was practicable to have supported it with headboard and stull. This was also admitted."

Third Assignment of Error.

The defendant complains of the admission of certain testimony indicating what change in the machine might have been made to render it more safe.

In the case of *New York Biscuit Co. vs. Rouss,* 74 Fed. 611, the local court permitted a witness to describe what danger there was of getting the hands caught in the machine, and what precautions witness had to take to prevent it, and the Circuit Court of Appeals held that it was proper expert evidence.

In *Peterson vs. Johnson,* 70 Minn. 538, a case similar to the case at bar, it was said:

"Assignments of error 11 to 14, inclusive, challenge the correctness of the rulings of the court in permitting plaintiff's witness to testify as to whether a guard could have been placed around the gearing in question and whether it was practicable to place one there. We are of the opinion that the evidence was competent expert evidence, and whether the witness was qualified as an expert to testify as to these matters was, on the evidence, a question of fact for the trial judge."

Thompson, Negligence, Sec. 7752.

With respect to the comment of the defendant relative to the competency of evidence showing that changes had been made in the machinery subsequent to the injury (Brief p. 45), attention is invited to page 174 Transcript, where it will be found that the plaintiff not only did not seek to adduce such testimony but assented to the striking of such when it was unintentionally brought out, and it was stricken.

In the case of *Choctaw O. & G. R. Co. vs. McDade,* 191 U. S. 96, the U. S. Supreme Court said:

"Evidence having been introduced by the railroad company to show by measurements that the waterspout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant com-

pany by reason of the fact that, after the accident, such reconstruction of the spout was made, and that such change had no bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence. We find no error."

In the case now under consideration, the evidence was stricken.

First Assignment of Error.

Defendant objected to the question asked witness Savage, "Do you know whether the cogwheels and machinery around the motor were guarded or not, Mr. Savage?"

In view of the fact that it was conceded throughout the entire trial of the case that the cogwheels were not guarded, even if the question was immaterial, the overruling of the objection to it was not prejudicial error. The question was not immaterial in that it showed the knowledge of defendant as to ignorance of plaintiff.

We believe we have shown that the theory of the plaintiff in error is wrong and unjust. We feel that this Honorable Court is in entire accord with the United States Supreme Court in holding that men should not be punished for being ignorant and

inexperienced, but that employers should take note of the ignorance and inexperience of their employes and either make the surroundings safe or give warning of the danger.

Inasmuch as the second trial was granted, improperly and contrary to law, for the alleged improper use of the word *"ANY"* in an instruction, and as the court abused its discretion in setting aside the $12,262 verdict, we submit that this Honorable Court should reinstate the first verdict rendered.

Respectfully submitted,

HERBERT W. MEYERS,
CHARLES A. ENSLOW,
Attorneys for Defendant in Error.